IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re	
STEPHEN RAY EVANS and ANNIS MILLER EVANS	No. 00-22335 Chapter 7
Debtors.	

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This chapter 7 case is before the court on a motion to dismiss for lack of good faith pursuant to 11 U.S.C. § 707(a) filed by Sun Atlantic, Inc., a contractor for the construction of the debtors' residence, which residence the debtors abandoned prior to its completion when the cost of the project "went out of control" in the debtors' words. The motion is premised on the debtors' substantial income, the debtors' alleged failure to make lifestyle adjustments, alleged omissions and misstatements in the debtors' statement of financial affairs and schedules, and the fact that the debtors are only seeking to discharge two obligations: the debt to Sun Atlantic and the deficiency balance remaining after the mortgage holder foreclosed on the unfinished dwelling. The debtors deny that good faith is lacking and allege that Sun Atlantic should be estopped from bringing this motion because the debtors' bankruptcy filing was caused by Sun Atlantic's misconduct in connection with the residence's construction. For the reasons set forth below, Sun Atlantic's motion to dismiss will be granted. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A), (J) and (O). This opinion contains findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I.

On September 1, 2000, the debtors, Stephen and Annis Evans, commenced the present case, listing total assets of $202,308.40 and total liabilities of $664,098.02. The scheduled assets included $23,100 in household goods and furnishings, a leased 1998 BMW 328is automobile valued at $25,000, a leased 1998 Land Rover Discovery sport utility vehicle also valued at $25,000 and over $125,000 in stock and stock options. Only six creditors were listed, consisting of the lessors of the two vehicles, BMW Financial Services and Land Rover Financial Services who were respectively owed $27,208.01 and $28,266.63; a debt of $21,828.13 to Grand Piano Furniture which held a security interest in furniture valued at $21,000; an unsecured obligation in the amount of $43,639.64 for a loan from Mr. Evans' 401(k) plan; a loan from Peter and Bernice Miller in the amount of $25,000; and a debt to Superior Mortgage Company of $518,155.61 for a "deficiency balance on home under construction located at 208 Hidden Forest Court, Johnson City, Washington County, Tennessee." According to the debtors' statement of intention, the debtors planned to surrender the house under construction but reaffirm the obligations on the two vehicles and the furniture.

In the original schedules of income and expenses which were filed with the petition, the debtors are listed as married with no dependents; Mr. Evans is listed as a pilot with Delta Airlines with a gross monthly income of $21,016.99 and Mrs. Evans is a librarian at Northeast State Community College with a gross monthly income of $2,533.75. After various deductions for taxes, insurance, retirement, a loan repayment, savings and stock purchases, the debtors' combined monthly net income is listed at $5,933.77 with monthly expenses of $8,733.70.

Subsequently, on September 22, 2000, the debtors amended their schedules to add a disputed unsecured obligation to Sun Atlantic in the amount of $600,000 for "Construction Costs on Home." The debtors also revised their schedule of personal property to reduce the values on the stock and stock options to sums totaling less than $75,000 and to add a breach of contract claim against Sun Atlantic. Adjustments were also made to the debtors' schedules of income and expenses, with Mr. Evans' gross monthly income reduced to $12,242.85, the debtors' combined monthly net income increased to $6,263.62, and the total monthly expenses lowered to $7,299.12.

Thereafter, on November 2, 2000, the debtors amended their schedules again. For the first time, the debtors scheduled as an asset a lot and a partially constructed house with a combined

value of $300,000. Superior Mortgage was changed from an unsecured to a secured creditor with a debt of $536,932, secured by a mortgage on the realty. The unsecured obligation to Sun Atlantic, originally scheduled for $600,000, was reduced to $100,000. With respect to the debtors' income and expenses, Mr. Evans' scheduled gross monthly income was amended to $11,531.40 and Mrs. Evans' was changed to $2,422.61. After various deductions, the debtors' combined monthly net income was scheduled at $5,970.58, with monthly expenses totaling $7,526.37.[1] The debtors also amended their statement of financial affairs to set forth a pending foreclosure for November 16, 2000, on the partially constructed house by Greene County Bank (apparently the assignee of Superior Mortgage) and to delineate various gifts and charitable contributions made by the debtors during the year preceding the bankruptcy filing.

On December 4, 2000, Sun Atlantic filed the motion to dismiss pursuant to 11 U.S.C. § 707(a) which is presently before the court. In the motion, Sun Atlantic alleges that the debtors filed their chapter 7 case in bad faith because "[t]he only debts the debtors seek to discharge are claims of Sun Atlantic, Inc., and Superior Mortgage, whose claims relate to an

[1]Copies of the Evanses' amended Schedules I and J filed on November 2, 2000, are attached as an exhibit to this opinion.

unfinished dwelling"; the debtors omitted material information in their schedules and statement of financial affairs; and the debtors have failed to make any postpetition adjustments in their lifestyle, in that the debtors propose to reaffirm two luxury vehicles and $21,000 worth of furniture and continue to "save or give away $3,320.63 monthly" in the form of savings, retirement and charitable contributions, and stock purchases. Sun Atlantic notes that the debtors intend to repay the loan from Mr. Evans' 401(k) plan at the monthly rate of $1,269.10 and the $25,000 loan from Peter and Bernice Miller, Mrs. Evans' parents.

In response to the motion, the debtors deny that their bankruptcy case was filed in bad faith. The debtors deny any intentional omissions of material information and state that any failure to disclose was corrected through amendments and disclosures at the 11 U.S.C. § 341(a) meeting of creditors. With respect to the charitable contributions and savings, the debtors explain that these deductions are in line with their prepetition conduct and that the vehicle leases were entered into long before the debtors' bankruptcy filing. The debtors assert that even if these monies were devoted to payment of their obligations it would not result in any meaningful

repayment because their liabilities exceed $400,000 even after the foreclosure sale of the realty.

The debtors also assert in response to the motion to dismiss that Sun Atlantic "should be estopped from raising the bad faith of the debtor[s] when its conduct is the primary reason these debtors were required to file bankruptcy." The debtors allege that "Sun Atlantic has been paid more than $600,000 on a dwelling that was supposed to cost $600,000 to complete and will yet require more than $200,000 to complete" and that "Sun Atlantic [has] failed to produce documentation of the costs expended for construction."

A hearing on the motion to dismiss was held on June 7 and 28, 2001. In connection with the hearing, the parties made the following stipulations:

1. On September 4, 1998, the debtors executed a note payable to People's Community Bank in the principal amount of $390,000. To secure the obligation, the debtors gave a lien on Lot 18 of The Ridges subdivision in Jonesborough, Tennessee.

2. A "Plans Review Checklist" dated September 9, 1998, reflects construction costs of $289,000 for 6,360 square feet of construction on the debtors' lot in The Ridges subdivision. The City of Johnson City issued a building permit in the amount of

$289,000 and the monetary limit for Sun Atlantic's Tennessee contractor's license as of September 1998 was $300,000.

3. On September 23, 1998, the debtors and Sun Atlantic entered into a Residential Construction Contract. As required by the contract, start-up funds totaling $40,000 were paid in September and October of 1998, with the clearing of Lot 18 and the construction by Sun Atlantic commencing shortly thereafter.

4. On July 21, 1999, People's Community Bank assigned the debtors' $390,000 note and the deed of trust securing the note to Superior Mortgage in exchange for the payment of $291,851.64 by Superior Mortgage to People's Community Bank. That same day, the debtors executed a note in the principal amount of $595,000 payable to Superior Mortgage and granted Superior Mortgage a second lien on Lot 18.

5. Between November 23, 1998, and June 3, 2001, Sun Atlantic submitted nine draw requests totaling $535,401.11 to the debtors and/or their lenders.

6. The ninth draw request in the amount of $98,480.56 was not paid, and on or about June 26, 2000, Sun Atlantic ceased work on the project.

7. On December 6, 2000, Greene County Bank, as assignee of Superior Mortgage, "enforced the first Deed of Trust against Lot

18 and the partially constructed house. Greene County Bank bid $350,000 at the Trustee's Sale."

8. On January 16, 2001, Greene County Bank filed an amended proof of claim in the amount of $230,904.66, which sum reflects the balance owed by the debtors after application of the foreclosure sale proceeds. Sun Atlantic filed a claim in the amount of $125,019.40.[2]

II.

The following testimony was received from the witnesses at the hearing:

Harvey Mitchell. Mr. Mitchell testified that he is employed as vice-president with People's Community Bank in Johnson City, Tennessee, although he was not the loan officer in charge of the Evanses' loan. According to an undated credit memo in the bank's files, Stephen and Annis Evans were approved for a construction loan in the requested amount of $400,000 for a house to be constructed on Lot 18 in The Ridges subdivision in Jonesborough, Tennessee. The memo indicated that the loan to value ratio was to be "NO MORE THAN 80% OF THE APPRAISAL OR THE

[2]The only other claims filed in this case include a claim for $18,842.09 by Grand Piano Furniture, and unexplained claims by Brian Cadle and David Woodby in the amount of $8,437.50 and Security Finance for $270.01.

COST TO BUILD, WHICHEVER IS LESS." According to preliminary specifications dated August 11, 1998, the total cost of the planned 6,227 square foot house, including lot, was $496,270.75. The undated memo further indicated that the Evanses originally planned to build at Hunter's Lake development in Johnson City, but moved the project to The Ridges after concluding that they would have the most expensive home in Hunter's Lake. The memo noted that the Evanses had a existing loan in the amount of $108,603 for the Hunter's Lake project, which loan would be paid in full from the sale of that lot.

A subsequent memo in People's Community Bank's files dated May 7, 1999, indicate that a loan in the amount of $390,000 was made to the Evanses on September 4, 1998, based on an appraised value of the house being constructed of $487,500. The memo indicated that the sum of $278,041 had been drawn down on the loan, some 71% of the loan amount, yet the house at that time was only 32% complete. Apparently, the May 7, 1999 bank memorandum had been written because Sun Atlantic had presented on April 28, 1999, a fourth draw for payment in the amount of $71,602.52, which People's Community Bank subsequently refused to fully fund.

At the same time as the fourth draw was presented for payment, the Evanses and Claudia Vanover of Sun Atlantic were

talking with People's Community Bank regarding an increase in the loan amount which they asserted was justified by revisions to the house plan which would increase the square footage to 7,379. In a letter to People's Community Bank dated April 30, 1999, Ms. Vanover opined that with these changes, the house would appraise for $650,000 to $700,000. These changes included the enclosures of three porches, plus raising the roof line of the garage to "make [the] Bonus Room more useable for Bedroom and Storage...[,] [c]hange decks from wood to concrete/stone finish and hand-rail from wood to ornamental iron," and "[c]omplete Terrace Level with Bar Area installing Limestone on the floors." In a revised preliminary estimate dated May 10, 1999,[3] Sun Atlantic placed the new construction cost on the house at $584,559.48, which with the cost of the lot, spa area, landscaping and new plans brought the total projected cost to $699,569.48. Mr. Mitchell testified that People's Community Bank declined to increase the amount of the loan to the Evanses and that as a result, the Evanses obtained new financing from Superior Mortgage, which paid off the People's Community Bank loan.

[3]Contrary to Ms. Vanover's April 30, 1999 letter which indicated that the new square footage was 7,379, the May 10, 1999 revised specifications listed the square footage at 7,193.

According to the records of People's Community Bank, the Evanses utilized $291,851.64 of their $390,000 loan. The sum of $106,863.35 was paid for the land and closing costs on September 9, 1998; $30,000 plus $10,000 was paid to Sun Atlantic for start-up costs; the first, second and third draw requests were respectively paid to Sun Atlantic in the amounts of $44,245.39 on November 25, 1998, $34,051.11 on January 8, 1999, and $37,601.09 on February 3, 1999; and sums totaling $14,386.27 were paid to Sun Atlantic in May 1999 in partial payment of the fourth draw request. In addition, $12,737.09 of the loan proceeds was paid to the Evanses for an undisclosed purpose on February 26, 1999, loan fees totaling $675 were charged in May and June 1999, and the sum of $1,292.34 constituted accrued, but unpaid interest owing at the time the People's Community Bank loan was paid off by Superior Mortgage on July 21, 1999.

Claudia Vanover. Ms. Vanover testified that she is the president and major shareholder of Sun Atlantic, a corporation which she formed to do business in the state of Tennessee. Ms. Vanover stated that she has approximately twenty-five years experience in the building industry, primarily in Atlanta, but that Sun Atlantic was to be a stepping stone for her to return to Tennessee where she had been reared and where her immediate family presently resides. While working as a consultant with

the developer of Hunter's Lake subdivision in Johnson City, Tennessee, Ms. Vanover met the debtors who were in the process of purchasing a lot in that subdivision. Thereafter, on May 10, 1997, the debtors and Sun Atlantic entered into a contract whereby Sun Atlantic agreed to construct a house for the Evanses on Lot 5 of Hunter's Lake subdivision, with the Evanses to pay all costs of construction plus a 15% builder's fee. The contract further provided that upon execution of the contract, the Evanses would pay start-up funds of $30,000, which amount was non-refundable but would be subtracted from the final payment to the builder. Ms. Vanover testified that the estimated cost for the construction of this house was "under $300,000."

Ms. Vanover stated that after this contract was entered into, the Evanses changed their mind and decided to build on another lot. As a result, an addendum to the May 10, 1997 contract was signed by the parties on June 14, 1997, providing for construction on Lot 65 instead. Ms. Vanover testified that with the change in lots there were resulting revisions to the house plans because the house on Lot 5 was designed to be a "cluster home" while Lot 65 constituted an estate lot, designed for larger, more expensive homes. Ms. Vanover testified that with these revisions, which included adding a partially-finished

basement to the house, the estimate for the house on Lot 65 was "somewhere around $498,000."

Ms. Vanover stated that after Lot 65 was surveyed and ready to be cleared, the Evanses again decided to change the location of the house, this time moving from the Hunter's Lake subdivision in Johnson City to The Ridges subdivision in Jonesborough, Tennessee, "the primary subdivision for the Johnson City area" with houses ranging "anywhere from $250,000 to well over a million dollars." Again, the change necessitated revisions to the house plans because, according to Ms. Vanover, the design guidelines in The Ridges were more stringent than the guidelines in Hunter's Lake. The two-car, front-loading garage was changed to a three-car, side-loading garage and the Evanses decided to completely finish the basement, putting in an exercise room, a media room, a bathroom, and a "toy room" area for Mr. Evans to work on antique cars. Because of the house's prominent location, the Evanses also upgraded the finishes on the house, adding more hardwood, tile and stone.

Ms. Vanover testified that the plans for the house in The Ridges provided for a 7,000 square foot brick house with stucco accents, five bedrooms, and four and a half baths, along with a three-car garage and a lower garage. The house included a craft room, a completed bar, surround sound throughout the house, an

alarm system, and phone system that could be used for intercom, along with custom cabinets, and lots of hardwood. Ms. Vanover also testified that the house was designed for future use, such as having the powder room plumbed for a shower.

According to Ms. Vanover, the contract for the house in The Ridges was signed in September 1998, the ground was cleared in late October, and framing began the last week of December 1998. Ms. Vanover testified that the Evanses paid the $30,000 start-up costs required by the contract on March 31, 1998, and paid another $10,000 on October 15, 1998. In February 1999, the Evanses decided to enclose the porches on each of the three levels of the house, turning the porch on the ground floor into a steam spa and a wine cellar, the porch on the main level into a morning room, and the porch on the upper level into a sitting room for the master bedroom and office area. To memorialize these changes, Ms. Vanover sent the Evanses a memorandum advising them that due to the modifications, construction on the house would stop until the house plans were changed and these changes approved by the developer of the subdivision and the city. The memo also recited that these changes would result in an increase in the price of the home although no specific dollar amounts were listed.

Ms. Vanover testified that when People's Community Bank refused to increase the amount of the loan to fund these changes, the Evanses contacted Superior Mortgage, which after receiving an appraisal on the house of $700,000 and obtaining lien waivers from all subcontractors, made a loan to the Evanses in the amount of $595,000 on July 21, 1999. A portion of the loan proceeds were used to pay off the outstanding loan to People's Community Bank in the amount of $291,851.64.

Ms. Vanover testified that due to the uncertainty of the Evanses' financing, construction on the house stopped from the end of April 1999 to the end of July 1999. When construction resumed, Sun Atlantic received a stop-work order dated August 6, 1999, from the City of Johnson City, which order remained in place for three weeks. Ms. Vanover testified that the order had been issued due to the city's concerns over the starts and stops in the construction of the house and the city's desire for a structural evaluation of the house. This work order was subsequently lifted after Alan Rommes, of Criterium Rommes Engineers, opined in a letter dated August 26, 1999, to the City of Johnson City that the structural changes in the revised area were acceptable.

Although the testimony was not clear on this point, it appears that when People's Community Bank refused to fully fund

the fourth draw request in the amount of $71,602.52, paying only $14,386.27 of that amount, the Evanses personally funded a portion of draw four, paying Sun Atlantic sums totaling $41,848.36 in May and June of 1999. Thereafter, Superior Mortgage paid Sun Atlantic sums totaling $264,865.52, which consisted of the balance of the fourth draw request, and draw requests five, six, seven and eight submitted from July 6, 1999, through February 29, 2000. Ms. Vanover testified that in February 2000 she talked with Jeff Williams of Superior Mortgage and advised him that a $50,000 increase would be required to complete the home. She stated that this increase was due to the framing being more expensive than planned and that the framer had "increased his contract from the square-footage price that he originally told me ... to a daily price because of the times he had to come and go." Other increased expenses were higher landscaping costs and custom-ordered front doors similar to those the Evanses had seen while traveling overseas.

Ms. Vanover testified that Sun Atlantic submitted draw request no. 9 in the amount of $98,480.56 to Superior Mortgage on June 3, 2000, and thereafter met with the Evanses on June 6, 2000, to discuss the estimated cost to complete the house. Ms. Vanover advised the Evanses that this amount was $173,931.51, but that after subtracting the balance remaining on the Superior

Mortgage loan and giving the Evanses credit for the initial $40,000 in start-up funds previously paid,[4] the additional sum they needed to complete the house was $115,983.16.[5] Ms. Vanover testified that she discussed with the Evanses some options which they could make to reduce this amount but was told by the Evanses that "there's no problem" and that they would just get the loan increased.

Ms. Vanover stated that after this meeting, Sun Atlantic continued with the construction although when the ninth draw request had not been paid by June 13, 2000, Sun Atlantic obtained $2,800 from Mrs. Evans to meet payroll. Ms. Vanover

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[4]The contract between Sun Atlantic and the Evanses provided that the $40,000 paid initially in start-up costs would be deducted at the end of the contract.

[5]From the court's review of the exhibits and the testimony of the other witnesses, it appears that Ms. Vanover's calculations were in error. As previously noted, the loan from Superior Mortgage was in the original amount of $595,000. In addition, the Evanses paid Superior Mortgage the sum of $50,000 on January 18, 2000, to reduce the loan balance. Subtracting the sum of $303,290.09 which Superior Mortgage disbursed at the outset of the loan ($291,851.64 to People's Community Bank and presumably loan closing costs) and subtracting the total paid thus far to Sun Atlantic, $264,865.52 (partial draw request no. 4 and draw request nos. 5-8), the balance of funds available on the loan as of June 2000 was $76,844.39, as set forth in Exhibit 47. When Ms. Vanover advised that the Evanses that the estimated cost to complete was $173,931.51, this amount did not include draw request no. 9 in the amount of $98,480.56. Adding these two amounts but deducting the loan balance of $76,844.39 and the $40,000 start-up funds, produces a difference of $155,567.68.

testified that on June 20, 2000, she received a telephone call from a Trish Lambert with MRK, a construction lending institution located in Knoxville, who advised her the Evanses had been approved for a construction loan from MRK, but that the loan could not include money for furniture purchases by the Evanses. Ms. Vanover further testified that at the end of June 2000, Mrs. Evans advised her that they were not sure if they could afford the house. Because of this information and the fact that ninth draw request had not been funded, Sun Atlantic stopped construction and had its attorney send a demand letter to the Evanses and Superior Mortgage requesting payment.

Ms. Vanover testified that when Sun Atlantic ceased working on the house, the brick and stucco were on, the house was roofed, the garage doors were on, the gutters up, interior sheetrock was in with paint on most of the walls, the bathtubs were in, and the landscaping was in progress. Work remaining to be done on the house according to Ms. Vanover included the interior trim work, setting tile, finishing the hardwood, installing the commodes, hanging the chandeliers, the last stage of the plumbing, electrical and HVAC work, “tweaking” and finishing the paint, and “items to that nature.”

Ms. Vanover testified that prior to the Evanses’ bankruptcy filing, she had a very good relationship with them and that

neither of the Evanses ever communicated any concerns about Sun Atlantic's construction before their bankruptcy filing. At one point, Mr. Evans advised Ms. Vanover that Superior Mortgage wanted to audit all of the books and Ms. Vanover stated that her reply was that she could not understand why this was wanted because an audit had been prepared for People's Community Bank, every draw since then had itemized the expenses associated with the draw, and Superior Mortgage had inspected the structure prior to the payment of each draw.

On cross-examination, Ms. Vanover testified that although she started a business degree at the University of Tennessee, she has no post-high school degrees, only on-the-job training. Ms. Vanover stated that her only project in Tennessee was the Evanses' project, and that the contracting license for Sun Atlantic, which was incorporated in May 1997, had now expired. Ms. Vanover admitted that she was never examined by the state of Tennessee personally for her qualifications as a contractor and that even though Tennessee requires a contractor's examination before issuing a contracting license, the examination for Sun Atlantic was taken by David Lees, Ms. Vanover's partner in Atlanta. Mr. Lees did no work in Tennessee on the Evanses' project. Ms. Vanover also testified that a contracting license can be obtained in one of two ways: the submission of a

financial statement or a license based on an amount ten times the contractor's net worth. Because Sun Atlantic initially obtained $30,000 in start-up costs from the Evanses, Sun Atlantic's only asset, Sun Atlantic was issued a contractor's license in the amount of $300,000. Ms. Vanover admitted that the building permit issued by Johnson City was in the amount of $289,000, and that she knew that the house could not be built for this amount, but stated that due to the form's fine print, she was not aware that this amount was on the permit until just recently.

Also on cross-examination, Ms. Vanover agreed that the City of Johnson City had indicated the reason for issuing the stop-work order had been because the porches were enclosed without these changes being submitted to the city, but stated that copies of the plans had been timely forwarded to the city. Ms. Vanover also conceded that when Alan Rommes inspected the construction he found some areas that needed to be improved, including some of the framing. Ms. Vanover stated that framing had been done in accordance with the truss and beam plans for the house prepared by Paty Lumber and approved by an engineer in Atlanta, but that Mr. Rommes' requested changes were made and the cost passed along to the Evanses. Ms. Vanover admitted that even after the stop-work order was lifted, other deficiencies in

the construction were brought to her attention by the City of Johnson City, but explained that it was standard in the building industry for the inspectors to find things that needed to be corrected. She also stated that any code violations that existed had all been corrected and that the city had approved everything to date.

When asked about the architectural plans used in the construction of the home, Ms. Vanover testified that the plans had originally been sold to the Evanses by the developer of Hunter's Lake subdivision, but were revised by Sonya Covell, an architect, retained by Sun Atlantic. Ms. Vanover agreed that these plans did not have a materials specification list. Ms. Vanover admitted that the framing labor on the project exceeded the estimate and when asked how she kept a log of the framer's time since she was in Atlanta and the invoices from the framer had no dates on them for when the work was performed, Ms. Vanover responded that she talked to the framer daily and that her son went by the job site periodically during the course of the week. Ms. Vanover testified that the amounts received by Sun Atlantic from all sources, including both People's Community Bank, Superior Mortgage, and the Evanses was $479,797.74, and that the total amount in invoices paid by Sun Atlantic was

$461,450.81.[6] After a discussion between both counsel, the court, and Ms. Vanover regarding the estimated cost to complete the house in June 2000, Ms. Vanover opined that "the house would have totally come in at $748,000 after everything was taken away, applied, and put in its proper places."[7] Ms. Vanover admitted, however, that this sum did not include the cost of the lot, $97,500, even though her $700,000 estimate on May 10, 1999, did include the cost of the lot.

Also on cross-examination, Ms. Vanover agreed that the material specifications which were attached to the contract were a part of the contract and that the contract specified that construction was to be in accordance with those specifications and any written change orders. Ms. Vanover observed, however, that it was a custom-built home for which the Evanses agreed to pay the cost plus 15% and that the selections by the Evanses overrode the specifications. Ms. Vanover conceded that no

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[6] Exhibit 39, which was a summary of the invoices, actually indicated a total of $471,450.81 but Ms. Vanover explained that the Gene Cox Mechanical Contractor amount was overstated by $10,000.

[7] Ms. Vanover indicated that she arrived at this number by adding the sums paid to Sun Atlantic, $479,797.74, with draw request no. 9 in the amount of $98,480.56, which was never funded, and $172,931.51, the cost to complete, amounts which actually total $751,209.81. Ms. Vanover later corrected herself stating that the amount should actually be $40,000 lower since the Evanses would be given credit for these start-up funds at the end of the project.

written change orders had been provided as required by the contract and that the Evanses would have had a better idea of the cost of the construction if this requirement had been met, but stated that she had told the Evanses many months before that the total cost at the end of the job would be around $750,000.

With respect to the June 29, 2000 demand letter sent by Sun Atlantic's attorney to Superior Mortgage after it failed to pay the ninth draw request and had instead requested an audit, Ms. Vanover agreed that the letter contained the following paragraph:

> I am further advised that you have insisted that my client provide you with an "audit" of their construction costs to date based upon the implication expressed to the Evanses, that somehow the costs of construction are incorrect. These innuendos and/or implications by you are false, intentional, malicious and defamatory against my client in their trade and profession, and therefore represent slander per se, for which they may be entitled to file suit for all damages, to include without limitation, punitive damages.

Ms. Vanover stated that she did not see this letter before it was mailed and that it went out without her approval. She stated that she had asked that the letter be sent because the ninth draw request had not been paid, Superior Mortgage was not allowing the Evanses to draw against the remaining balance of the construction loan and Superior Mortgage was seeking an audit

for the four draws it had paid even though an audit had been performed at the time Superior Mortgage took over the loan from People's Community Bank. Ms. Vanover admitted that in a July 14, 2000 letter from Superior Mortgage's attorney in response to Sun Atlantic's June 29, 2000 demand letter, Superior Mortgage requested that it be provided with the information establishing that all of the loan proceeds had been used solely for the construction of the house as required under its loan agreement with the Evanses, but that Sun Atlantic had not responded to this request. Ms. Vanover explained, however, that by the time that letter arrived, the Evanses were in breach of contract because the ninth draw request had not been paid and the Evanses had made no other arrangements to pay the costs of construction. Ms. Vanover stated that because of the breach of contract by the Evanses, Sun Atlantic exercised its option to cease construction and terminate the contract. Ms. Vanover conceded that until the filing of the bankruptcy case, she had not furnished the information regarding the invoices to anyone. With respect to the proof of claim filed by Sun Atlantic in the amount of $125,019.40, Ms. Vanover testified that this amount represents monies that Sun Atlantic either obligated to pay or has paid on the job and that there was no credit for the initial $40,000 paid by the Evanses because the contract states that when the

owner is in breach of contract, this sum reverts back to the builder. Ms. Vanover admitted that the Evanses were relying on her for the construction of their home, that it was her responsibility as a contractor to finish the job at a cost that would be within reason of what was anticipated, and that it was part of her responsibility to contain the cost on the home.

Jeff Williams. Mr. Williams, a banking officer with Superior Mortgage, verified that Superior Mortgage had inspected the house prior to the payment of each draw. Mr. Williams testified that when the loan was made, Superior Mortgage had an estimate from Sun Atlantic which indicated that the cost of the house including lot would be approximately $700,000 and had an appraisal which stated that the house when completed would be worth $700,000. Accordingly, Superior Mortgage loaned the Evanses the sum of $595,000, based on a loan to value ratio of 85%. Mr. Williams testified that the Evanses had no difficulty qualifying for the loan in this amount based on their income and excellent credit. However, Mr. Williams did make suggestions to lower the cost of the house, such as carpeting the terrace level rather than stone, constructing the rear deck from wood rather than poured concrete and ornamental, and deleting the spa and theater. With these changes totaling $52,549.25 which produced a revised total cost to build of $653,845.23, Mr. Williams

estimated in a July 5, 1999 memo to other bank officials that after deduction of the sums paid to date, the amount needed to complete the house was $321,073.34.

Mr. Williams testified that throughout the funding of the loan, there were lots of discussions, including some with Ms. Vanover, concerning the fact that the loan was being funded ahead of progress and that some point he had a conversation with Mr. Evans and Ms. Vanover that he really had to have hard numbers as to the cost to complete rather than estimates. Mr. Williams testified that in June 2000, after receiving the ninth draw request and an estimate rather than the exact amount of the cost to complete and realizing that the project was far over what had been estimated, he asked to be provided with copies of the receipts and invoices in order to determine where the money had gone and in an attempt to get the house completed. Mr. Williams stated that he needed this information in order to determine whether Superior Mortgage could increase the loan amount. Mr. Williams stated that this request was communicated to Ms. Vanover by Mr. Evans on June 26, 1999, in a telephone call made in Mr. Williams' presence. According to Mr. Williams' notes of that conversation, Ms. Vanover agreed to provide this information although she indicated that she was very busy and could not get the paperwork together immediately.

The notes also indicated that Mr. Evans asked Ms. Vanover to give Mr. Williams a call but he never heard from her. Instead, he received the letter from Sun Atlantic's attorney.

With respect to Ms. Vanover's estimated cost to complete, Mr. Williams estimated that the Evanses would need another $160,000 to complete the house and that while it would be a stretch for the Evanses to pay this additional amount, the primary consideration was that there was no indication that the house's appraisal value had increased from $700,000 such that additional loan amounts would be justified. Mr. Williams testified that absent concrete evidence as to the amount required to complete the house, his hands were tied as to alternatives to resolve the problem. Mr. Williams testified that after foreclosure, the uncompleted house is on the market for $350,000.

Mr. Williams' notes indicate a conversation with Mr. Evans on December 14, 1999, wherein Mr. Evans wanted to modify the loan to add additional things such as wiring for total theater system and that estimates were from $35,000 to $65,000. The notes indicate that Mr. Williams told Mr. Evans that he could not afford any changes that would increase rather than decrease the cost of the house. Notes from March 10, 2000, indicate a telephone conversation with Ms. Vanover wherein she stated that

she had told the Evanses for four months that there was not enough money to do what they wanted, and that Mr. Evans that had insisted on the home theater wiring, etc., against her recommendation. These notes further indicated that the four of them would meet the week of March 27 and that Mr. Williams had stressed "it is imperative that we nail down numbers — no room for guessing."

Annis Evans. Upon examination by Sun Atlantic's counsel, debtor Annis Evans testified that she and her husband are presently renting a house for $900 per month and that she drives a leased 1998 BMW, but was unsure of the amount of the monthly lease payments, admitting that her husband is more familiar with the financial affairs of the household than she. When asked about postpetition changes in their lifestyle, Mrs. Evans testified that "[w]e don't eat out as much any more" and noted that her husband has recommenced charitable contributions, which had ceased during the construction. Mrs. Evans admitted that she and her husband are still driving the same vehicles, and that she is still contributing approximately $500 a month into a voluntary retirement plan.

When asked if there were any significant changes to the amended Schedule J which had been filed in November of 2000, Mrs. Evans stated that the scheduled $1,200 monthly food expense

varied depending on her husband's flying schedules, but that the expense decreased when he was at home since they were now living in a place where she could cook. Mrs. Evans also stated that the scheduled $300 monthly payment to repay the loan from her parents had not yet begun. With respect to changes in income, Mrs. Evans testified that she received a pay raise in December of 2000 which increased her annual income to $34,601. When questioned how they had planned to afford the house which would require a house payment in the range of $4,500 to $5,500 a month since their schedules already indicated a monthly deficit, Mrs. Evans explained that her husband could address that issue better but that they would not have begun the project if they had not thought they could afford it. She admitted that she has a masters degree in library science and expects to work twenty more years. Mrs. Evans further admitted that the only debts she and her husband are seeking to discharge are those of Superior Mortgage and Sun Atlantic.

With respect to the construction, Mrs. Evans testified that she and her husband met with Ms. Vanover in early June 2000 to discuss the cost to complete the house and that they were provided with a copy of the estimated cost to complete. Mrs. Evans testified that she did not recall that either she or her husband voiced any concern at the meeting about the estimate,

but stated they were somewhat in shock. Mrs. Evans also admitted that during the course of the construction, neither she nor her husband ever sent anything in writing to Ms. Vanover expressing concerns related to the construction and that before construction ceased in June of 2000, neither had expressed any concern to Ms. Vanover regarding the quality of the construction. Mrs. Evans agreed that she and her husband had an amiable relationship with Ms. Vanover during the building of the house.

Mrs. Evans conceded that she may have expressed concerns to Ms. Vanover that Mr. Evans was spending too much on certain items during the construction, such as the theater and surround sound. Ms. Evans also testified that on June 13, 2000, she made a deposit of $2,800 in Sun Atlantic's account to fund the payroll, but subsequently told Ms. Vanover that she could not continue to do this because it would deplete their savings.

Upon examination from her own counsel, Mrs. Evans stated that in selecting materials for their house, she relied on Ms. Vanover to inform her as to whether the selection would fit within the budget. When asked if Ms. Vanover had told her for months that there was not enough money to do all they wanted to do, Mrs. Evans responded that this was discussed in a phone conversation toward the end, but that prior to giving them the

June 2000 completion estimate, Ms. Vanover had never mentioned they were out of line that much. Mrs. Evans testified that on June 26, 2000, after her husband telephoned Ms. Vanover from Jeff Williams' office in order to request copies of the invoices, Ms. Vanover telephoned her and advised her that she did not have to submit the requested invoices because she did not work for Superior Mortgage.

Ms. Vanover was also asked about the $25,000 loan from her parents. She stated that Ms. Vanover had notified her that People's Community Bank had stopped payment on a check to Sun Atlantic and that as a result, Sun Atlantic's check in the amount of $25,000 to a window supplier had been returned for nonsufficient funds. According to Mrs. Evans, Ms. Vanover told her that they would have to pay this amount so the windows could be purchased and the Evanses' credit not affected. Mrs. Evans stated that her husband was out of town and they did not have $25,000 in the bank, so her parents cashed out some money from their retirement account and loaned it to her. Mrs. Evans testified that Ms. Vanover told her that she would be repaid on the next draw from the bank, but that never happened. According to the bank statements, this loan took place on June 1, 1999. From the exhibits, it appears that this $25,000 amount was

included in the total $41,848.36 paid to Sun Atlantic by the Evanses in the spring of 1999.

Mrs. Evans testified that because of religious convictions, she and her husband contribute about 10% of her husband's income to charity and to help certain family members, that this has been their practice for many years, and that although these contributions were reduced during the construction, they are now back at their previous level. The Evanses give $200 monthly to Mr. Evans' grandmother and they formerly gave $100 monthly to Mr. Evans' niece to assist her with college expenses, but she has since graduated from college.

Mrs. Evans testified that the furniture from Grand Piano Furniture was purchased in July of 2000 for a total purchase price of $21,000, and that the monthly payments are $800. Mrs. Evans explained that when she and her husband sold their home in 1997 and began renting a smaller residence to cut expenses in anticipation of building a new home, they "got rid of a bunch of things." Subsequently in July 2000, the Evanses moved to a larger house because the small rental house was being sold. Mrs. Evans testified that because of this move, they made the furniture purchase from Grand Piano, noting that the new furniture could also be used in the constructed house.

Mrs. Evans stated that except for $4,000 in savings, she and her husband had put all the money available to them into the construction of their home, and that a $50,000 investment, which would have provided additional construction funds, went into receivership. Mrs. Evans admitted on cross-examination, however, that they had not touched Mr. Evans' Delta stock or his stock options. In response to leading questions by her attorney, Mrs. Evans denied that she had done anything to mislead her creditors and agreed that she would have avoided bankruptcy if there had been any other reasonable solution available to her to pay her debts. She stated that she had no animosity toward Ms. Vanover in filing this bankruptcy proceeding.

Patricia Lambert. Ms. Lambert testified that in June and July of 2000 she was employed by MRK Mortgage Lenders as a loan originator and that during this period of time, Mrs. Evans was referred to her for a possible jumbo loan of between $800,000 and $900,000. Ms. Lambert testified that she obtained all of the necessary information and paperwork for the loan from Mrs. Evans and that based on the their income and credit, the Evanses were "pre-qualified." Ms. Lambert testified that they were waiting on Mr. Evans to give the "go ahead" for the loan. According to Ms. Lambert, Mr. Evans was concerned that they

would not be able to afford the house payments and that the payments would deplete so much of their income that they could not buy furniture. Finally, Mr. Evans advised her that they would not be going forward with the loan but would be filing bankruptcy instead.

On cross-examination, Ms. Lambert admitted that although MRK Mortgage Lenders approved loans with a 100% loan to equity ratio, the loan amount could not exceed the appraised value of the house and that an $800,000 loan could be made only if the house appraised for that amount. She testified that at the time the Evanses decided not to move forward with the loan, no appraisal had yet been obtained although one had been ordered. Ms. Lambert denied that the Evanses wanted to include their furniture purchases with their house loan or that she informed Ms. Vanover of any such desire.

Stephen Evans. Debtor Stephen Evans testified that he has an undergraduate degree in engineering technology, and has been a pilot for Delta Airlines for thirteen years. Mr. Evans stated that he is 43 years old and that he plans to continue working until age 60, his mandatory retirement age. Mr. Evans testified that the monthly lease payment on the 1998 Land Rover driven by him is approximately $500, and that this lease will expire in August of 2001, but that he had not yet decided whether to

exercise his purchase option. With respect to the BMW driven by his wife, Mr. Evans testified that the monthly lease payment is $526 per month and that the lease will not expire for another fourteen months.

Mr. Evans testified that he knew that the $390,000 loan from People's Community Bank, which was obtained to construct a house in Hunter's Lake subdivision, was insufficient to cover the cost of construction at The Ridges site. When asked where he thought the balance of the money would come from when he made the decision to buy The Ridges lot, Mr. Evans explained that the bank loan officer had some personal problems at the time and he thought that when these problems were squared away, they would be able to move forward with increasing the loan amount. Mr. Evans acknowledged that the November 30, 1999 agreement with Superior Mortgage required the Evanses to reduce the outstanding debt on the construction loan before any additional draws could be made. Mr. Evans testified that he met this requirement in January 2000 by borrowing from his 401(k) retirement account the sum of $50,000, the maximum amount he was allowed to borrow.

Sun Atlantic's counsel asked Mr. Evans about Mr. Williams' directive that certain changes be made to the house plans in order to reduce cost. Mr. Evans denied that Mr. Williams wanted the theater or surround sound wiring to be eliminated, saying

that only the purchase of the equipment, such as projectors and speakers were to be postponed. Although Mr. Evans admitted that $8,000 was paid to Atlanta Home Theater, he denied that this was for special wiring, stating that some of the wiring was for telephone, cable TV, prewiring for a home security system, and prewiring for future expansion into stereo. Mr. Evans admitted that he requested the installation of a Christmas light circuit, but stated that he doubted that this resulted in an additional expense of $800. Mr. Evans conceded that originally there was going to be a small patio on the first level in the back of the house, but what was actually built runs the full length of the house.

Regarding their bankruptcy schedules, Mr. Evans admitted that neither The Ridges house nor the debt to Sun Atlantic was scheduled in their original schedules. He explained that the reason for the omissions was that they thought the house had been foreclosed by Superior Mortgage and that they did not owe Sun Atlantic anything because it was retaining the $40,000 start-up funds. When asked about the storage expenses in his monthly expenditures, Mr. Evans stated that he was storing miscellaneous garage-type items such as their artificial Christmas tree, bicycles, foot lockers, storage containers, some shelves, and some pieces of lumber. The monthly expense of $350

for foreign currency exchange is travel money when Mr. Evans is overseas since all of his flights are international. Mr. Evans denied that the bank account balances set forth in his schedules were incorrect, explaining that they were based on his "check register balance" rather than the amount set forth in his bank statement. He admitted, however, that he and his wife had turned over approximately $9,000 to the chapter 7 trustee based on the amounts that were in their bank accounts on the petition date. Mr. Evans further admitted that the schedules filed by him and his wife did not disclose that as of September 1, there were unpaid wages owing to them both which had accrued during August but were not scheduled to be paid until September. Mr. Evans acknowledged that he had disclosed no interest in insurance policies in his schedules even though he and his wife own life insurance policies, but explained he responded in this fashion because the policies have no surrender value.

Mr. Evans acknowledged that his schedules indicate that the stock options owned by him have no value, but in an agreement reached with the chapter 7 trustee, he is paying the trustee a certain sum of money in lieu of surrendering these options. Mr. Evans was asked about the fact that in his schedules of personal property, he listed "none" as the value of "[b]ooks, pictures, and other art objects," but that in the loan application to

Superior Mortgage in 1999, the Evanses listed personal assets of $100,000, including $25,000 in artwork. Mr. Evans explained that they answered "none" in their schedules because they had gotten rid of a lot of things in the past and he doubted that the items they had left had any value to the bankruptcy estate. Mr. Evans stated that the $25,000 amount was based on the appraisals conducted by the military when he and his wife moved from Panama back to the United States in 1988 and that these appraisals are grossly overstated in order to allow recovery in the event of loss. Mr. Evans stated that they used this appraisal amount when completing the loan application because they were pressed for time and this was the most current information they had available to them.

In response to questions from his own counsel, Mr. Evans testified that their vehicle lease payments were equal to or less than their previous car payments. Mr. Evans testified that he had no control over the repayment terms of his 401(k) loan: the only two repayment options were a lump sum repayment or repayment over a maximum three-year period, the option he had chosen, and that unless the loan is repaid, his receipt of the loan is considered income upon which he would have to pay taxes plus a 10% penalty. The Evanses' 1998, 1999 and 2000 tax returns indicated charitable contributions of $8,861, $6,410,

and $4,771 respectively, and these amounts did not include the contributions to family members. These tax returns also indicated unreimbursed employee expenses of $11,171, $16,735 and $15,057 during 1998, 1999 and 2000 respectively. It was noted that if annual unreimbursed employee expense were $16,000, or a monthly average of $1,333, the $507 amount budgeted by the Evanses in their schedules for this expense was insufficient. Mr. Evans explained that as a result, other items in the budget make up the shortfall such as one-half or better of the budgeted $1,200 monthly food expense being utilized for meals while Mr. Evans travels for Delta, along with uniforms under the clothing expense, and the $350 foreign currency exchange amount. Mr. Evans also testified that his monthly $500 deduction for savings had been used in the past for these unreimbursed expenses.

Mr. Evans admitted that he and his wife had previously built another house, that they had experienced problems with the house, and that the matter had been settled before litigation commenced. Mr. Evans stated that the estimated cost for the first house at Hunter’s Lake was just over $300,000, that the anticipated cost for the second house was approximately $400,000, and that when he began The Ridges construction, he thought the house and lot would cost a total of $500,000 based on his conversations with Ms. Vanover and the preliminary

specifications dated August 1998. When it was pointed out to Mr. Evans that he testified at the 11 U.S.C. § 341(a) meeting of creditors that his initial expectations were that the house would cost $600,000, Mr. Evans explained that he must have mispoken at the meeting. Mr. Evans admitted that he was advised in May 1999 that the house would cost $700,000, but stated that he told Ms. Vanover at the time that this amount was as high as they could go. Mr. Evans stated that when Superior Mortgage took over the loan, it wanted an audit of Sun Atlantic's expenses, but Ms. Vanover instead produced the lien waivers. Mr. Evans testified that towards the end of the project, he informed Ms. Vanover on five separate occasions that Superior Mortgage wanted an audit before moving forward with the project and that she gave various responses to the requests, finally stating that she was just too busy.

With respect to efforts to obtain other funding, Mr. Evans acknowledged that he and his wife contacted MRK Mortgage Lending about a loan and dealt with Teresa Lambert for the initial portions of the loan, but then worked with her boss because Ms. Lambert did not have the authority to handle a loan of that size. Mr. Evans testified that MRK told them that it could loan $700,000 toward the house, which amount would not have been sufficient to complete the house. Although Mr. Evans

acknowledged that the MRK loan would have produced another $100,000 toward the completion of the house and that $76,844.39 remained available on the Superior Mortgage, Mr. Evans stated that they would be $150,000 short of the total completion cost of $850,000, noting that MRK wanted the Evanses to pay a percentage of the loan as a down payment which money they did not have. Mr. Evans stated that he and his wife could not have afforded an $800,000 or $900,000 loan and to his knowledge, a loan in these amounts was not even discussed. Mr. Evans testified that he unsuccessfully attempted to work with Superior Mortgage to come up with a solution to the problem such as a second mortgage or finishing the house and then putting it on the market. He stated that he even met with an attorney other than his bankruptcy counsel in an attempt to determine his legal options.

Mr. Evans testified that he and his wife filed for chapter 7 relief because they could not service a debt of $850,000. He explained that they did not file under chapter 13 because they could not afford to pay all of their obligations including the anticipated $400,000 deficiency on the house (which later proved to be $230,000), the $50,000 loan from his retirement account, the $25,000 obligation to his in-laws, and the $125,000 debt to Sun Atlantic.

Mr. Evans testified that he did not know that Sun Atlantic was only licensed for $300,000 and stated that it was their expectation that Ms. Vanover would be moving to Tennessee to oversee the construction of the house. Mr. Evans stated that he did not recall ever seeing any of the memos from Ms. Vanover; his conversations with her were always face-to-face or by phone. When asked to describe the construction defects in the house, Mr. Evans stated the following: the forward wall of the basement was changed from concrete to cinder block; the forward wall now has a large floor-to-ceiling crack and wet spots; a planned offset in a main wall was not put in which resulted in a change to the roof line; the basement slab did not have a required offset; the main structural walls were not properly aligned; stairs were not properly constructed which resulted in a redesign of the entire foyer and dining room interfaces; and various other adjustments to room dimensions, doors, and windows had to be made due to inadequate plans and errors. Mr. Evans testified that as a result, he and his wife were billed not only for the original construction work, but also to correct the errors. Mr. Evans explained that when construction ceased, there were no cabinets, plumbing, fixtures, interior doors, heat pumps, front doors, carpeting, or appliances in the house.

Mr. Evans was also questioned regarding the retroactive pay raise which Delta pilots recently negotiated. Mr. Evans testified that the raise would be retroactive to May 2000, but that he did not know the amount of his raise nor the lump sum amount he would receive in back pay.

Alan Rommes. Mr. Rommes, a civil engineer with Criterium Rommes Engineers, testified that he was first consulted on the Evanses' house when the stop-work order was issued by the City of Johnson City. The purpose of the consultation was to review the order and determine what could be done to satisfy the city's requirements. Mr. Rommes testified that upon his inspection of the house, he identified several problems which would need to be addressed to satisfy the city's anticipated framing inspection, although the basis of the stop-work order was that the porches were being enclosed without the city's approval of the house plan revisions. The deficiencies noted by Mr. Rommes were as follows: (1) the load-bearing walls in the middle of the house did not align; (2) there was an improper header over one of the openings in the basement; (3) there were unsupported load-bearing points on the second floor where the walls were sitting over open areas without support; (4) there was a deficiency in the header over the garage door opening; (5) there was a problem with the way the roof had been framed and the ceiling joists and

rafters installed; and (6) there was a problem with the size of the ceiling joists on the second floor. Mr. Rommes testified that despite these problems, he and the parties decided to respond only to the concerns which caused the stop-work order, the enclosed porches, and that is why his letter opined that the revised areas were satisfactory. Mr. Rommes stated that he charged $2,100 for this consultation, but the check from Sun Atlantic was for $2,300, which included $200 owed to Mr. Rommes by Sun Atlantic for another project where he had provided consultation services, although Mr. Rommes admitted that the $200 amount was not included in Sun Atlantic's invoice itemization.

Mr. Rommes testified that his next involvement with the Evanses' project was in August 2000 when he was contacted by Washington County Bank to determine the cost to complete the house. His estimate was $229,600, which included a 20% contractor's fee and a sum to "address some of the conditions that had developed while the home had been sitting vacant, such as moisture in the basement."

Mr. Rommes' last involvement with the Evanses' house was in connection with the present litigation where he was asked by the Evanses to review the construction costs to date. Mr. Rommes opined that the house plans "were very basic and lacking in

detail"; "there were no wall sections; there were no specifications for any types of materials"; and "[i]t didn't have anything on specifications for structural items; nothing of that nature." In Mr. Rommes' opinion, this lack of detail led to the structural problems which he encountered when he first examined the house, since the framer was left to figure out the framing on his own which is complicated in a house of this size. Mr. Rommes stated that the correction of the framing deficiencies resulted in additional framing expense, noting that the second floor ceiling in the master bedroom was redone twice. When asked about the quality of the framing on the house, Mr. Rommes opined that he would rate it below average. Mr. Rommes admitted on cross-examination that Paty Lumber had prepared the truss plans and that he had found their plans acceptable on other projects.

Mr. Rommes testified that based on his analysis, the structure as it stands today should have cost $391,000 to build to its present stage of construction. When this number is added to the cost to complete of $229,600 minus the cost of an outside contractor, the total construction cost for the completed house (not including the cost of the lot) should have been $595,000, which Mr. Rommes noted was close to Ms. Vanover's estimated cost of $584,000 made in May 1999 after the decision was made to

enclose the porches thereby increasing the size of the house. Mr. Rommes testified the major difference between his estimate of the appropriate construction cost to date and that actually spent by Sun Atlantic was the labor expense for the framing, stating that based on the square footage charge by the framer plus the outside trim work, the framing labor cost should have been around $35,000 when in fact it was $90,000. Mr. Rommes stated that even with the extra work done by the framer to correct deficiencies, "framing costs [were] still out of line somewhere in the magnitude of $50,000." Other cost deficiencies noted by Mr. Rommes were that invoices included charges for items that were not on site, such as millwork, appliances, plumbing fixtures, cabinetry, landscaping and ceramic tile, which all together total $50,428. Mr. Rommes also stated that there were materials on site for which there were no invoices and that these items would have cost $5,000. Mr. Rommes testified that in his opinion extra brick was ordered, a lot of mortar was used, the surveying expense was $1,000 excessive since it included a charge for an unnecessary topographic map, and the insulation charges were twice what they should have been for the amount of insulation utilized in the home, a $5,000 difference. According to Mr. Rommes, with the excessive framing charge and the invoices for which there are no materials,

"you're looking at about a hundred to a hundred and ten thousand dollars worth of difference in what's actually there versus what's been proposed out there." Mr. Rommes explained, however, that in actuality, his cost to complete approximated Ms. Vanover's since his anticipated the purchase of appliances, plumbing fixtures, tile, etc., while Ms. Vanover's did not include these costs since they had already been included in previous draws.

Claudia Vanover. On recall, Ms. Vanover testified that the house plan charge of $6,850 was not only for The Ridges house, but the Evanses' plans on the two Hunter Lake lots, although she admitted on cross-examination that the plans for the first lot were obtained from the developer of the subdivision, and that these were revised for the second lot. Similarly the $1,562 survey charge was for the three different lots and the topographic map was recommended by the surveyor. Ms. Vanover also explained that the Evanses had approved the use of cinder block instead of poured concrete when she had been unable to obtain a reasonable estimate for the poured concrete. Ms. Vanover testified that some of the charges on the invoices were for suppliers who required deposits or full payment prior to delivery. Ms. Vanover disputed Mr. Evans' statement that the addition of Christmas wiring added minimal cost, noting that the

change orders added up to an additional $1,907. With respect to Mr. Evans' statements regarding the one foot offset in the keeping room, Ms. Vanover explained that the use of cinder block rather than poured concrete required the deletion of this offset and that this change had been discussed with the Evanses at the time. Ms. Vanover testified that the additional brick was for the construction of an arbor. With respect to the framing labor cost, Ms. Vanover stated that because of the delays associated with the change in house plans in February 1999, the unpaid draw in April 1999, and the stop-work order in August 1999, the framer changed his request for compensation from square footage to a per diem and that the framer did work other than the framing such as building the deck and the cornice and setting the windows.

Ms. Vanover also stated that other corrections should be made to the $461,450.81 invoice total including a deletion of $4,610 from sums paid All Seasons Insulation, a deduction of $10,000 from Ferguson Enterprises because the appliances were not paid for, and a deduction of $13,258.35 because Ceramic Technics retrieved its tile and thus was not paid. Ms. Vanover stated that the landscaper had been paid because he did grade work, a lot of prep work, and some plant installation.

III.

11 U.S.C. § 707(a) provides the following:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

Although lack of good faith is not expressly delineated in this statute as a basis for dismissal, the Sixth Circuit Court of Appeals has specifically held that lack of good faith is a valid cause of dismissal under § 707(a), concluding "that the word 'including' [in § 707(a)] is not meant to be a limiting word." *Industrial Ins. Serv., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1126 (6th Cir. 1991). The *Zick* court noted that it agreed with the conclusions of the bankruptcy court in *In re Jones*, 114 B.R. 917 (Bankr. N.D. Ohio 1990), that "although the jurisdictional requirement of good faith is not explicitly stated in the statute, it is inherent in the purposes of bankruptcy relief." *In re Zick*, 931 F.2d at 1129. The Court of Appeals also quoted *Jones* for the proposition that:

> The Bankruptcy Code is intended to serve those persons who, despite their best efforts, find themselves hopelessly adrift in a sea of debt. Bankruptcy protection was not intended to assist those who, despite their own misconduct, are attempting to preserve a comfortable standard of living at the expense of their creditors. Good faith and candor are necessary prerequisites to obtaining a fresh start. The bankruptcy laws are grounded on the fresh start concept. There is no right, however, to a head start.

Id. at 1129-30 (quoting *In re Jones*, 114 B.R. at 926). The court cautioned that:

> Dismissal based on lack of good faith must be undertaken on an *ad hoc* basis. [Citation omitted.] It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

In re Zick, 931 F.2d at 1129.

Before addressing Sun Atlantic's assertion that the Evanses filed this case in bad faith, the court will initially examine the Evanses' argument that Sun Atlantic has unclean hands such that it should be estopped from raising lack of good faith as a basis for dismissal. The debtors assert it was Sun Atlantic's behavior during the course of construction that caused them to seek bankruptcy relief, as the expenses of construction exceeded all of Sun Atlantic's estimates.

"As an equitable doctrine, the application of unclean hands rests within the sound discretion of the court." *Magnolia Gas Transmission Co. v. Compression Solutions Co. (In re Magnolia Gas Co.)*, 255 B.R. 900, 925 (Bankr. W.D. Okla. 2000).

> [E]stoppel is not favored and it is the defendant who has the burden of proving every element of an estoppel. [Citation omitted.] As a basis for equitable estoppel, the party invoking the estoppel must have acted in reliance on the actions of the other party, with the result that the party seeking to invoke estoppel be injured by his own conduct without the estoppel. [Citation omitted.] Finally, a party claiming the benefit of an equitable estoppel must have proceeded with the utmost good faith. [Citations omitted].

Elvis Presley Enter., Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 895 (6th Cir. 1991).

In large part the issues regarding Sun Atlantic's alleged unclean hands and the Evanses' alleged lack of good faith primarily turn on one question: Who was responsible for the "run-away" costs in this failed construction? Contrary to the finger pointing by each side, it appears that neither party was totally innocent and that fault in some respect lies with both parties, as is often the situation in these types of cases. From the evidence presented, the court concludes that the initial cost of the house to be built in The Ridges subdivision was $500,000. The specifications dated August 11, 1998, indicated that the total cost of the planned 6,227 square foot

house including lot was $496,270.75 and the $390,000 loan by People's Community Bank on September 4, 1998, was an 80% loan based on a house which would appraise at $487,500. The People's Community Bank credit memo dated August 28, 1998, approving the loan clearly indicated that the loan was for The Ridges lot. Ms. Vanover's assertion that the $500,000 amount was the estimate for the second Hunter's Lake lot is contrary to the other evidence and is not supported by the timing of the various events since the contract for the second Hunter's Lake lot was signed on June 14, 1997, more than a year previously.

On the other hand, it was the Evanses, primarily Mr. Evans the court gleans, who was responsible for the cost increasing to $700,000 by May 1999. It was undisputed that the Evanses requested that the porches be enclosed, increasing the square footage of the house by approximately 1,000 square feet, and that the finishes be changed, revisions which increased the anticipated cost by $200,000. The Evanses made these changes without having the required financing in place and delaying construction from May through July 1999. Thus, if any additional costs of construction can be attributed to this delay, the Evanses bear the responsibility.

Furthermore, it appears that the Evanses were not particularly cost conscious even after the price reached

$700,000. In early 2000, the Evanses requested mahogany front doors comparable to what they had seen overseas, adding $5,000 to the cost of the house. The Evanses also appeared to have continued with the expenses associated with "surround sound," despite Mr. Williams' recommendations to the contrary. Mr. Williams' notes indicated a conversation with Mr. Evans on December 14, 1999, wherein Mr. Evans requested permission to go ahead with the wiring and speakers for the surround sound, which request Mr. Williams denied since the changes would not increase the appraised value of the house. Similarly, Mr. Williams' notes describe a March 10, 2000 conversation with Ms. Vanover wherein she stated that Mr. Evans "insisted on the Home Theater wiring etc. against her recommendation" and that she had "told the Evans for 4 months that there was not enough [money] to do what they want." Even Mrs. Evans conceded that she may have confided to Ms. Vanover that she thought Mr. Evans was being too extravagant.

In addition, it does not appear that the Evanses paid their required portion of the construction costs. The Superior Mortgage loan required an 85% loan to value ratio such that with respect to the $700,000 estimated cost, the bank was funding $595,000 and the Evanses' $105,000. Including the loan from Mrs. Evans' parents, the Evanses paid Sun Atlantic $41,848.36

and paid down the Superior Mortgage debt by $50,000 for a total contribution of $91,848.36. This amount, however, must be reduced by the $12,737.09 given to the Evanses in February 1999 out of the People's Community Bank loan, such that the Evanses' total contribution, including a $1,000 deposit on the People's Community Bank loan, was only $79,111.27 rather than the required $105,000.[8]

Nonetheless, the Evans' failure to pay their share of the construction costs and their requests for additions to the plans do not fully account for the house's final construction costs. Although in May 1999 Sun Atlantic estimated the total cost for the house and lot at $700,000, by June 2000 Sun Atlantic had revised this estimate such that based on the estimated completion costs, the total cost for the lot and constructed house was going to be $808,209.81.[9] Notwithstanding this change in the construction costs, there was no evidence that there was a commensurate increase in the appraised value of the house. To the contrary, the house's appraised value remained at $700,000.

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[8]The evidence indicated that the Evanses had paid other monies such as the interest on the two construction loans and association fees to the two subdivisions. These amounts, however, are inapplicable to the Evanses' 15% requirement.

[9]This sum of $808,209.81 consists of the amounts paid to date to Sun Atlantic, $479,797.74, plus draw request no. 9, $98,480.56, plus the cost to complete, $132,931.51 ($172,931.51 - $40,000), plus the amount paid for the lot, $97,000.

Ms. Vanover asserts that the delays occasioned by the Evanses' financing problems and the stop-work order from the City of Johnson City caused the framer to change his method of payment from a square footage to an hourly basis and that this change caused the additional expense along with the expensive doors and additional landscaping. However, Mr. Rommes opined that even if the framer had been paid on a hourly basis rather than by the square foot, the framing charge should not have exceeded $35,000, when it fact the framing cost was $90,432. Mr. Rommes testified that even with the extra work performed by the framer to correct mistakes, the framing bill was "out of line somewhere in the magnitude of $50,000." Based on Mr. Rommes' evaluation of the house plans, the total cost for the house and lot should not have exceeded $700,000.

From the evidence which was presented, the court concludes that "fault" for the majority of the additional $100,000 in costs lies with Sun Atlantic rather than the Evanses. Although it was negligent for the Evanses to make $200,000 in changes to the house plans without having the required financing in place, Sun Atlantic's failure to supervise the framing along with the lack of detail in the house plans led to excessive and inappropriate framing charges. Sun Atlantic chose the architect and it was Sun Atlantic's responsibility to monitor the framing.

As the results revealed, such monitoring was not properly done by a contractor in Atlanta, some 400 miles away from the job site. While Ms. Vanover testified that her son regularly checked with the framer, there was no evidence that he had the expertise sufficient to evaluate the framer's work.

Further evidence of Sun Atlantic's inattention to the project was the work-stoppage order issued by the City of Johnson City. Although Ms. Vanover testified that the changes were sent to the city for approval, there was no indication of any follow-up in order to ascertain that the city had received the revised plans and had no objection. Given the time period for when the changes were first made (February 1999) and when the stop-work order was issued (August 1999), there would have been more than adequate time for Sun Atlantic to ensure that the project met city requirements. As such, any costs associated with this delay should have been borne by the builder rather than the owner.

Sun Atlantic's failure to produce the invoices when requested along with the litigious letter written by her attorney in response to the request suggests that Ms. Vanover realized that the costs had exceeded the appropriate level and that she was primarily to blame for the overrun. Given the status of the construction and the fact that the loan balance

had almost been depleted, Superior Mortgage's desire to obtain a full accounting of the expenses to date was not only a sound business decision, but also a prerogative under the contract between Superior Mortgage and the Evanses. Furthermore, it was Sun Atlantic's responsibility under its contract with the Evanses to "provide ... cost estimates, construction information and other such items that Builder may reasonably obtain to assist Owner with the information necessary for financing." The suggestion by Sun Atlantic's attorney that Superior Mortgage's legitimate inquiry constituted tortious interference with contract and defamed Ms. Vanover was simply wrong and calls to mind the sports adage that the best defense is a good offense.

Additionally, the court was troubled by Sun Atlantic's inability to set a firm amount on the cost to complete. Even in June 2000 after more than a year of construction, Sun Atlantic was still producing estimates rather than the hard numbers requested by Superior Mortgage. The court realizes that the contract between the Evanses and Sun Atlantic was a cost plus percentage agreement rather than a fixed price. Nonetheless, certain material specifications had been anticipated from the beginning and by June 2000, Sun Atlantic should have been able to fix a firm completion price subject to any changes by the Evanses. Sun Atlantic's failure to produce a firm, final cost

suggests either an inexperienced or inattentive contractor. While it is true that the Evanses should have anticipated additional expense each time they made changes to the plans such as enclosing the porches and adding expensive front doors, they could not have anticipated the cost overruns resulting from Sun Atlantic's failure "to complete the project in a reasonably expeditious and economical manner consistent with the interest of the Owner" as required by the parties' contract.

Notwithstanding the foregoing conclusions, the court does not find that Sun Atlantic should be estopped from challenging the Evanses' good faith in this bankruptcy case. Instead, as will be discussed below, the Evanses' own actions in this regard bar them from asserting equitable estoppel. *See Elvis Presley Enter., Inc. v. Elvisly Yours, Inc.*, 936 F.2d at 895 ("[A] party claiming the benefit of an equitable estoppel must have proceeded with the utmost good faith.").

IV.

Several courts have developed a list of factors to be considered when examining the good faith of debtors. One of the most frequently cited lists is that formulated by the bankruptcy court in *In re Spagnolia*, 199 B.R. 362 (Bankr. W.D. Ky. 1995), wherein the court found the following factors to be relevant:

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.

2. The debtor failed to make lifestyle adjustments or continued living an expensive or lavish lifestyle.

3. The debtor filed the case in response to a judgment pending litigation, or collection action; there is an intent to avoid a large single debt.

4. The debtor made no effort to repay his debts.

5. The unfairness of the use of Chapter 7.

6. The debtor has sufficient resource to pay his debts.

7. The debtor is paying debts to insiders.

8. The schedules inflate expenses to disguise financial well-being.

9. The debtor transferred assets.

10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors.

11. The debtor employed a deliberate and persistent pattern of evading a single major creditor.

12. The debtor failed to make a candid and full disclosure.

13. The debts are modest in relation to assets and income.

14. There are multiple bankruptcy filings or other procedural “gymnastics.”

Id. at 365. *See also In re Emge*, 226 B.R. 396, 399-400 (Bankr. W.D. Ky. 1998). In *Spagnolia*, the court noted that "generally, the presence of only one of these factors is not sufficient to support a § 707(a) dismissal." *In re Spagnolia,* 199 B.R. at 365 (citations omitted). The court went on to state that "[h]owever, where a combination of these factors are present, courts have held that a § 707(a) dismissal is warranted." *Id. See also In re Cappuccetti*, 172 B.R. 37 (Bankr. E.D. Ark. 1994); *In re Brown*, 88 B.R. 280 (Bankr. D. Haw. 1988).

A few of these factors may be quickly discarded as inapplicable to the present case. With respect to factors one and eleven, there was no evidence that the debtors reduced their creditors to a single creditor in the months prior to filing the petition or that they employed a pattern of evading this creditor. The Evanses had historically used little credit and in fact sought to reduce their living expenses prior to the commencement of the construction by selling their house and renting a smaller residence. Similarly, there was no indication that the Evanses transferred any assets to evade their creditors or that the Evanses had ever filed for bankruptcy relief previously, factors nine and fourteen respectively.

Factor twelve is whether the debtors failed to make a candid and full disclosure. The Evanses did fail initially to schedule

the debt to Sun Atlantic and the house as an asset. However, the court found their explanation credible that they did not believe under the terms of the contract that they owed a debt to Sun Atlantic and that the house belonged to Superior Mortgage since they had walked away from the construction. Furthermore, the erroneously high income amounts listed for Mr. Evans in the original schedules and the first amendment indicate that the Evanses sought to fully and accurately disclose all of their income.

On the other hand, the court is concerned by the fact that in their schedules, the Evanses assigned no value to the Delta stock options held by Mr. Evans and stated that they had no "[b]ooks, pictures and other art objects, antiques, ... collections or collectibles," even though in 1999 in their Superior Mortgage loan application, the Evanses had listed pictures and art objects in the amount of $25,000. While the court found some validity in the Evanses' explanation in this regard, it is difficult for the court to believe that the Evanses honestly believed that the stock options had no value whatsoever and that they had no assets which fell within the "books, etc." category. The discrepancy in the valuations suggests that the Evanses inflate values when it works to their advantage such as when they are attempting to appear prosperous

in order to obtain a loan, but downplay assets and values when they want to seem impoverished and in need of bankruptcy relief. Whatever the reason, the court questions whether the Evanses have been completely forthright in this regard.

Continuing with an analysis of the *Spagnolia* factors, clearly factor three is present in this case since it is undisputed that the Evanses filed bankruptcy in order to avoid a large single debt, the anticipated deficiency obligation to Superior Mortgage arising from their surrender of the partially constructed house. The fact that the Evanses are also seeking to discharge the Sun Atlantic debt does not negate this factor; according to the Evanses' own testimonies, they did not realize that they owed Sun Atlantic when the case was filed and both the Sun Atlantic and Superior Mortgage obligations arise out of the same failed project. Furthermore, in contrast to the intent to discharge these debts, the Evanses desire to repay obligations to insiders (factor seven), the $25,000 debt to Mrs. Evans' parents and the $50,000 loan from Mr. Evans' 401(k). The court realizes that absent repayment of the 401(k) loan, it would have been treated as income such that the Evanses would have to pay taxes at the rate of 29% and a 10% penalty. Even so, the fact remains that this is not a true debt and the Evanses are simply repaying themselves. *See Harshbarger v. Pees (In re*

Harshbarger), 66 F.3d 775, 777 (6th Cir. 1995) (while chapter 13 debtors' proposal to repay loan from ERISA account may represent prudent financial planning, it was not necessary for the "maintenance or support" of the debtors); *In re Esquivel*, 239 B.R. 146, 150 (Bankr. E.D. Mich. 1999) ("There is a clear consensus that an individual's pre-petition borrowing from his retirement account does not give rise to a secured or unsecured 'claim,' or a 'debt' under the Bankruptcy Code.").

Factor two is that the debtors have failed to make lifestyle adjustments or continued living an expensive or lavish lifestyle. Generally, the court would not characterize the Evanses' lifestyle as lavish; they own no boats, furs, expensive jewelry, vacations homes, or even their own residence. Nonetheless, they enjoy a standard of living out of reach of the majority of Americans. The Evanses have a combined monthly gross income, according to the schedules, of $13,954.01, or an annual income of $167,448.12. Furthermore, Mrs. Evans testified that she received a pay raise in December, which raise added over $5,500 to the Evanses' annual gross income. Similarly, Mr. Evans testified that pursuant to the new contract between Delta and the pilots' union, he would receive a pay increase,

retroactive to May 2000.[10] The Evanses lease luxury vehicles, dine out often, and apparently vacationed overseas within the last year. They have no dependents and other than the debts in connection with the house construction, leased vehicles and furniture, few obligations. Although the Evanses' schedules indicate that their monthly expenses exceed their income, the expenses are largely for discretionary matters such as retirement and charitable contributions. As for assets, the Evanses have over $150,000 in retirement accounts, $1 million in term life and accidental death insurance, 152.50 shares of Delta Airlines stock, and almost 2,500 stock option shares of Delta Sky.

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[10]Mr. Evans testified that he did not know what effect the raise would have on his income or the amount of the lump-sum back payment, even though he admitted that he was "detail-oriented." Mr. Evans did state that captains will receive a 12% pay raise and that as a first officer, he is paid 63.4% of a captain's pay, such that if a captain's pay increases, his pay will also increase in order to maintain the same percentage ratio. Because the Evanses' schedules indicate that Mr. Evans earns $11,531.40 per month or $138,376.80 annually, the court calculates that a captain's pay is currently $218,259.94 ($138,376.80/63.4%), such that a 12% pay raise will produce a new captain's income of $244,451.13 and a new first officer income of $154,982.02 or an annual raise of $16,605.22 to Mr. Evans. Due to the retroactive nature of the raise, the lump-sum payment to Mr. Evans will also exceed $16,000. Given Mr. Evans' education and personality, the amount of publicity given the Delta contract, and the fact that a captain's raise of 12% is also a 12% raise for a first officer due to the ratio between the two salaries, the court did not find Mr. Evans to be credible when he expressed ignorance as to how the pay raise would personally affect him.

While the debtors did apparently cut back on expenses while they were constructing the house, there is no indication that their present debt has resulted in any lifestyle adjustments. Mrs. Evans testified that they had recommenced their charitable contributions and when specifically asked what adjustments had been made since the bankruptcy filing, could only recount that they do not eat out as much as they had previously. The court finds its particularly telling that on July 15, 2000, six weeks before their bankruptcy filing and less than a month after construction ceased on their residence, the Evanses purchased $21,000 worth of furniture, including a 43-inch projection television.[11]

These facts belie the Evanses' assertion that they made every effort to repay their debts and avoid bankruptcy, factor four. Granted, Mr. Evans did testify that he had tried, with no avail, to work out alternatives with Superior Mortgage so that the house could be completed and that he even consulted an attorney other than his bankruptcy counsel in an attempt to resolve their financial problems. There was also evidence that the Evanses approached another loan company to obtain a loan in

[11]From the proof of claim filed by Grand Piano Furniture, it appears that after the Evanses filed for bankruptcy relief, the 43-inch television was exchanged for a 53-inch television in November 2000, although there was only an additional $54 cost.

a higher amount. Even so, the Evanses chose to simply walk away from the house, filing bankruptcy within two months of the end of construction, leaving Superior Mortgage and Sun Atlantic to clean up the mess with the house and any unpaid subcontractors. The Evanses chose this route, even though they had a legitimate claim against Sun Atlantic for the cost overruns on the house.

The last relevant factors are numbers six and eight, that "[t]he debtor has sufficient resource to pay his debts" and "[t]he schedules inflate expenses to disguise financial well-being." Notwithstanding the Evanses' schedules of income and expenses which indicate a monthly $1,500 deficit, the Evanses have substantial income, sufficient to meet their monthly obligations and more. The present schedule of expenses indicates a monthly rent expense of only $900, while the evidence indicated that a monthly payment on a $600,000 loan at 8% interest over 30 years would be $4,404.98 and over 25 years would be $4,633.18. Mrs. Evans testified that she was confident that they would not have commenced building the house if they couldn't have afforded it. Thus, the Evanses are clearly capable of and even contemplated making payments over $3,000 a month more than they are presently paying. Presumably, those

funds are now being spent on savings,[12] retirement contributions, charitable contributions, and in other discretionary areas. The Evanses jointly contribute $2,224.53 a month to retirement plans, savings accounts and stock purchases, which as one court has observed "evidences an ability to accumulate funds for their own purposes while choosing not to save for repayment of unsecured debt." *In re Barnes*, 158 B.R. 105, 109 (Bankr. W.D. Tenn. 1993). According to their schedules, the Evanses also pay a total of $262.48 a month on term life and accidental death insurance, a questionable expense for a working couple with no dependents. *See In re Woodward*, 265 B.R. 179, 192 (Bankr. S.D. Iowa 2001) ($60.86 per month for term life insurance not reasonable expense where both debtors were employed, there were no dependents, and debtors had a $25,000 whole life policy which could be utilized in the event of husband's death); *In re Rothman*, 204 B.R. 143, 158 (Bankr. E.D. Penn. 1996) (life

[12]Mr. Evans testified that the $500 per month he contributes to savings is often used for unreimbursed employee expense. However, Mr. Evans also testified that at least $600 per month of the $1,200 monthly food allowance falls into this category, along with the $507 per month specifically for "Non-reimbursed Employee expenses," $100 for "Foreign Currency Exchange," and $25 for "Uniforms." Because these amounts total $14,784 annually and the Evanses' tax returns indicate that Mr. Evans' unreimbursed expenses averaged $14,321 in 1998-2000, it appears that $500 contributed on a monthly basis to savings would rarely be needed to supplement Mr. Evans' expenses.

insurance payments of $350 per month were excessive and not reasonably necessary for support and maintenance of debtors); *In re Vianese*, 192 B.R. 61 (Bankr. N.D.N.Y. 1996) (United States trustee's motion to dismiss debtor's chapter 7 case for substantial abuse under 11 U.S.C. § 707(b) granted as court found life insurance premium payments of $250 per month excessive). The Evanses also pay $65 per month on storage costs to store items that most families keep in their garage. Over a five year period, the savings, life insurance, storage amounts directed toward repayment of their debts would produce a debt reduction of $153,120.60.

Furthermore, Mr. Evans pays $1,269.10 per month to retire his 401(k) loan, an obligation that will be repaid within three years of when it was borrowed in April 2000. Similarly, the Evanses' furniture, which is being paid at the rate of $822 per month, should be paid off in less than three years from when it was purchased in July 2000. If these amounts are added in the last two years of a repayment, another $50,186.40 could be paid on the Evanses' obligations, not to mention the additional $1,000 a month in income which the debtors will be receiving from their raises. These sums will go a long way toward repaying the $232,000 which remains to Superior Mortgage after

the foreclosure and whatever amount, if any, a court determines that the Evanses owe Sun Atlantic.

For persons with the Evanses' income to walk away from the construction project and the debts associated therewith is an unfair use of chapter 7 bankruptcy. The Evanses chose to build a $700,000 house.[13] Their income has not decreased since they made that decision, but has in fact increased. The fact that the total cost came in over $100,000 more than anticipated[14] is a reason to assert a claim against the builder, not to file bankruptcy, considering the Evanses' otherwise healthy financial

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[13]As previously noted, $700,000 was Sun Atlantic's projected cost of the house and lot in May 1999 and the sum the Evanses admittedly agreed to pay. This estimate, however, did not include over $36,000 in attendant expenses which were disbursed from the loan proceeds for purposes other than construction costs, i.e., $9,863.35 in closing costs incurred when the People's Community Bank loan was made, the closing costs attributable to the Superior Mortgage loan which appear to have been $11,438.45, and portions of the People's Community Bank loan utilized by the Evanses for other purposes, such as the $12,737.09 in funds which went directly to the Evanses, $1,292.34 in interest charges and $675 in bank fees. With these additional amounts, the total cost of the entire project would have totaled approximately $736,000 even if Sun Atlantic had met its original $700,000 estimate.

[14]As set forth previously in footnote no. 9, in June 2000 Sun Atlantic estimated the total cost of the completed house and lot at $808,209.81, an amount generally consistent with Mr. Rommes' calculation. Nonetheless, from the Evanses standpoint the total cost of the project would be $845,216.04, which consists of the $595,000 loan, the $44,648.36 paid directly to Sun Atlantic by the Evans, the $50,000 paid by the Evanses to Superior Mortgage, and the $155,567.68 in additional funds required to complete construction (*see* footnote no. 5).

picture. The Evanses did have two investments which failed, the KI Digital and the Mata Services stock, producing a loss of approximately $64,000. Nonetheless, the Evanses are well-educated, healthy, relatively young, and anticipate at least another 17 years in the work force. Their income is excellent and remains stable. They have no dependents and little debt, other than the obligations arising out of the failed home construction. Rather than use their significant income to repay these obligations, the Evanses chose to instead to simply walk away from these debts in order to maintain their current standard of living, a course of action that the bankruptcy system will not countenance.

It was with respect to facts similar to these that the bankruptcy court in *Zick* concluded that the debtors had filed for bankruptcy relief in bad faith. *In re* Zick, 931 F.2d at 1126 n.1. The debtor therein filed chapter 7 days after a $600,000 judgment was entered against him. *Id.* The court noted that the debtor had a continuing monthly income of at least $7,000 plus certain pension plan benefits along with personal property of approximately $90,000. *Id.* at 1128. The court also concluded that "the Debtor ha[d] made no marginal, much less significant adjustments in his lifestyle, to make any fleeting or meaningful effort to repay the obligation." *Id.* at 1126 n.1.

See also In re Tanenbaum, 210 B.R. 182, 186 (Bankr. D. Colo. 1997) ("Debtors in Chapter 7, in particular, who earn over $123,000 gross per year and who insist on continuing to live the 'good life' with little or no sacrifice, are the symbols of a system gone awry. Use of the bankruptcy system by persons of extraordinarily high income and persons attended by all the accouterments of wealth are an abuse to the privileges and opportunities afforded under the Bankruptcy Code."); *In re Griffieth*, 209 B.R. 823 (Bankr. N.D.N.Y. 1996) (debtors with after-tax monthly income of $14,168.48 who sought to discharge debt to IRS of $543,728 filed chapter 7 in bad faith).

V.

In light of the foregoing, the court concludes that the debtors did not file this chapter 7 case in good faith. Accordingly, an order will be entered contemporaneously with the filing of this memorandum opinion dismissing this chapter 7 case.

FILED: February 7, 2002

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE